



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 12, 1998

Mr. Richard M. Abernathy
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OR98-0440

Dear Mr. Abernathy:

On behalf of the Plano Independent School District (the "school district"), you ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 112843.

The school district received several requests for an investigative report concerning Harrington Elementary School. You assert that the requested information is excepted from required public disclosure based on sections 552.101, 552.102, 552.103, 552.107(1) and 552.111 of the Government Code.

The Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, is incorporated into the Open Records Act by section 552.026 of the Government Code. FERPA provides that no federal funds will be made available

to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents.

20 U.S.C. § 1232g(b)(1). "Education records" are those records, files, documents, and other materials which

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A). We believe that the requested information is an "education record" for purposes of FERPA. *See* Open Records Decision No. 332 (1982). However, section 552.026 in conjunction with FERPA may not be used to withhold entire documents; the school district must delete information only to the extent "reasonable and necessary to avoid personally identifying a student" or a student's parents. *See id.*; Open Records Decision No. 206 (1978). Thus, only information identifying or tending to identify students or their parents must be withheld from required public disclosure. Consequently, the school district must redact all information that could identify a student or student's parent.

Section 552.103(a) of the Government Code reads as follows:

(a) Information is excepted from [required public disclosure] if it is information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103 applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

Section 552.103 requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 518 (1989). A mere threat to sue is not sufficient to establish that litigation is reasonably anticipated. *See* Open Records Decision No. 331 (1982). There must be some objective indication that the potential party intends to follow through with the threat. *See* Open Records Decision No. 452 (1986) at 5.

You assert that litigation is reasonably anticipated. We have reviewed your arguments and the materials you submitted in support of your section 552.103 claim. We conclude that the school district has not established the applicability of section 552.103 in this instance.

You express concern for the employee's privacy. Section 552.101 excepts from required public disclosure information considered to be confidential by law, including information made confidential by judicial decision. This exception applies to information made confidential by the common-law right to privacy. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See id.*

Section 552.102(a) of the Government Code excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The test to be applied to information claimed to be protected under section 552.102 is the same test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. *See Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

We have reviewed the information. There is a legitimate public interest in the activities of public employees in the workplace. *See Open Records Decision No. 444 (1986)*. We conclude that the information requested is not protected from public disclosure based on the common-law right to privacy. Thus, the school district may not withhold the information from public disclosure based on section 552.101 or section 552.102.

Section 552.111 of the Government Code excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See Open Records Decision No. 615 (1993)*. An agency's policymaking processes do not encompass internal administrative and personnel matter. *See id.* As the information at issue concerns administrative and personnel matters, section 552.111 is inapplicable.

You object to the public disclosure of exhibit 18, which you say is comprised of three memoranda. The exhibit 18 you submitted to this office contains two memoranda. You maintain that these memoranda are privileged attorney-client communications and attorney work product.

Section 552.107(1) of the Government Code states that information is excepted from required public disclosure if

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Although section 552.107(1) appears to except information within rule 1.05 of the Texas State Bar Disciplinary Rules of Professional Conduct, the rule cannot be applied as broadly as written to information that is requested under the Open Records Act. Open Records Decision No. 574 (1990) at 5. To prevent governmental bodies from circumventing the Open Records Act by transferring information to their attorneys, section 552.107(1) is limited to material within the attorney-client privilege for confidential communications; "unprivileged information" as defined by rule 1.05 is not excepted under section 552.107(1). Open Records Decision Nos. 574 (1990) at 5, 462 (1987) at 13-14.

Thus, this exception protects only the essence of the confidential relationship between attorney and client from the disclosure requirements of the Open Records Act, that is, only information that reveals attorney advice and opinion or client confidences. See Open Records Decision No. 574 (1990). See Open Records Decision No. 574 (1990) at 5. We have reviewed the two documents in exhibit 18. We conclude that the school district has not explained the applicability of section 552.107(1) to these documents.

This office recently stated that if a governmental body wishes to withhold attorney work product under section 552.111, it must first show that the work product was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993). See Open Records Decision No. 647 (1996) at 5. The school district has failed to show that exhibit 18 was created for trial or in anticipation of litigation under the *National Union* test. Accordingly, the school district may not withhold exhibit 18 from disclosure based on section 552.111 as attorney work product.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Hastings
Assistant Attorney General
Open Records Division

KHH/rho

Ref.: ID# 112843

Enclosures: Submitted documents

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